

ORSHANSKY & YEREMIAN LLP  
A Limited Liability Partnership  
ANTHONY J. ORSHANSKY, Cal. Bar No. 199364  
anthony@oyllp.com  
JUSTIN KACHADOORIAN, Cal. Bar No. 260356  
justin@oyllp.com  
16133 Ventura Boulevard, Suite 1245  
Encino, California 91436  
Telephone: (818) 205-1212  
Facsimile: (818) 205-1616

Attorneys for Plaintiffs SVEN SMEETS, ARAGORN  
MALLORY, and JOSHUA BECKWITH  
on behalf of themselves and others similarly situated

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

SVEN SMEETS, an individual,  
ARAGORN MALLORY, an  
individual, and JOSHUA BECKWITH,  
on behalf of himself and others  
similarly situated,

Plaintiff,

v.

PATH, INC., a Delaware corporation,  
and DOES 1 to 50, inclusive,

Defendants.

Case No. CV 13-03057 WHO

**CLASS ACTION COMPLAINT FOR  
VIOLATIONS OF THE TELEPHONE  
CONSUMER PROTECTION ACT, 47  
U.S.C. § 227**

**DEMAND FOR JURY TRIAL**

1           1.     Plaintiffs Sven Smeets, Aragorn Mallory, and Joshua Beckwith  
2 (collectively, “Plaintiffs”) bring this action on behalf themselves and all persons  
3 who received one or more unauthorized text messages from Defendant Path, Inc.  
4 (“Path” or “Defendant”), a Delaware corporation, in violation of the Telephone  
5 Consumer Protection Act (“TCPA”), 47 U.S.C. § 227.

6                                   **JURISDICTION AND VENUE**

7           2.     This Court has subject-matter jurisdiction over the claims alleged  
8 herein pursuant to 28 U.S.C. § 1331 because those claims arise under the laws of the  
9 United States.

10          3.     This Court has personal jurisdiction over Defendants because a  
11 substantial portion of the wrongdoing alleged in this Complaint occurred in  
12 California, and Defendants are authorized to do business in California, have  
13 sufficient minimum contacts with California, and otherwise intentionally avail  
14 themselves of the markets in California through the promotion, marketing, and sale  
15 of merchandise sufficient to render the exercise of jurisdiction by this Court  
16 permissible under traditional notions of fair play and substantial justice.

17          4.     Venue is proper in this Court pursuant to 28 U.S.C. §§ 84(a) and 1391  
18 because Defendant Path, a Delaware corporation, is headquartered in San Francisco  
19 County, California.

20          5.     The true names and capacities, whether individual, corporate, associate,  
21 or whatever else, of the defendants sued herein as Does 1 to 50, inclusive, are  
22 currently unknown to Plaintiff, who therefore sues these defendants by such  
23 fictitious names . Plaintiffs are informed and believe and thereon allege that each of  
24 the defendants designated herein as Does is legally responsible in some manner for  
25 the unlawful acts referred to herein. Plaintiffs will seek leave of court to amend this  
26 Complaint to reflect the true names and capacities of the defendants designated  
27 herein as Does when their identities become known. (As used herein, “Defendants”  
28 refers to Path and Does 1 to 50, inclusive.)

1           6.     Plaintiffs are informed and believe and thereon allege that each  
2 defendant acted in all respects pertinent to this action as the agent of the other  
3 Defendants, that Defendants carried out a joint scheme, business plan, or policy in  
4 all respects pertinent hereto, and that the acts of each defendant are legally  
5 attributable to the other Defendants.

6                                   **INTRADISTRICT ASSIGNMENT**

7           7.     Pursuant to Local Rules 3-5(b) and 3-2(c), this action should be  
8 assigned to the San Francisco Division of the Northern District of California  
9 because Defendant Path resides in San Francisco County.

10                                  **FACTUAL BACKGROUND**

11           8.     Defendants run a social network that has registered millions of users  
12 across the world. As part of its service the company created a application, or “app,”  
13 for cellphones that allows users to post photos, videos, music, text, stickers, voice,  
14 location, and so forth, to share with other users.

15           9.     Upon information and belief, Defendants, in an effort to promote its  
16 service and app, sent and continues to send text messages to persons who have never  
17 registered or even heard of Path using Short Message Service, or SMS, a messaging  
18 system that allows cellular telephone subscribers to use their cellphones to send and  
19 receive short text messages, usually limited to 160 characters. An SMS message is a  
20 text message call directed to a wireless device through the use of the telephone  
21 number assigned to the device.

22           10.    In or around May 2013, Plaintiff Smeets received the following  
23 promotional text message from Defendants:

24                               Sharon Schleepen wants to show you private  
25                               photos on Path. Get the app:  
26                               <https://path.com/i/RmmSD>

27           11.    This message contained a hyperlink directing Plaintiff Smeets to  
28 Defendants’ website where Defendants requested Plaintiff Smeets to “Create a Path

1 Account.” Below this exhortation were a number of blank fields, apparently  
2 intended to be filled in by Plaintiff Smeets in order to create an account, and below  
3 these fields was a clickable icon stating “Sign Up for Path.”

4 12. In or around July 7, 2013, Plaintiff Mallory received the following  
5 promotional text message from SMS short code 59730, a code which upon  
6 information and belief is registered to Defendants or its agents:

7 Aj - Jon Barlow wants to share photos with you on Path!

8 <https://path.com/i/31RrNR>

9 13. The link directed the recipient to a webpage at the top of the page was a  
10 photo icon with a generic photo of a man in profile, below which was an exhortation  
11 to “Create a Path Account” and “Sign Up for Path.”

12 14. In or around June, 2013, Plaintiff Beckwith received a promotional text  
13 message from an unidentified short code, which upon information and belief  
14 belonged to Defendants or their agents. The text message did not address Plaintiff  
15 Beckwith by name but stated that someone wanted to show him photos on Path and  
16 implored him to get the app by clicking on a hyperlink, which directed him to a page  
17 exhorting him to “Create a Path Account” and “Sign Up for Path.”

18 15. The text messages sent to Plaintiffs were advertisements written in an  
19 impersonal manner because, *inter alia*, they were sent from SMS short codes that  
20 were, upon information and belief, registered to Defendants or their agents, were  
21 phrased in the third person, and either did not identify or else misidentified the  
22 names of the recipients. Plaintiffs allege upon information and belief that  
23 Defendants used equipment to mine Path users’ contact lists (among other sources)  
24 and send en masse to each and every one of the persons in users’ contact lists a  
25 generic text message imploring him or her to view photos and “get the app” and in  
26 which the Path user’s names and even, on occasion, the recipients’ names were  
27 automatically inserted in an attempt to create a personalized appearance which, upon  
28 information and belief, was designed to attract the attention of recipients and also

1 avoid liability under the TCPA.

2 16. Upon information and belief, Defendants sent promotional text  
3 messages to the contact lists of former users of Path, i.e., persons who had cancelled  
4 their accounts and thus had no intention of finding friends on Path.

5 17. Prior to receiving the alleged text messages Plaintiffs had never heard  
6 of Defendants, their service, or their app, and had never consented to receive text  
7 messages from Defendants. Moreover, Plaintiffs had no reason to be in contact with  
8 Defendants because they had no preexisting relationship with Defendants.

9 18. Upon information and belief, Defendants sent, and continue to send,  
10 thousands of similar unauthorized text messages using equipment which has the  
11 capacity to store or produce telephone numbers to be called using a random or  
12 sequential number generator and to dial such numbers. By using such equipment,  
13 Defendants were able to effectively send thousands (if not more) text messages to  
14 lists of thousands of wireless telephone numbers without human intervention. Upon  
15 information and belief, these text messages were made en masse through the use of  
16 short codes and without the prior express consent of Plaintiffs and other members of  
17 the putative class.

18 19. Defendants did not give Plaintiffs or other recipients of these text  
19 messages the opportunity to request Defendants to cease sending such unwanted  
20 messages in the future.

21 20. Plaintiffs and, upon information and belief, other putative class  
22 members were harmed owing to the inconvenience, annoyance, and invasion of  
23 privacy of receiving these unauthorized text messages, and owing to the fact that  
24 recipients, including Plaintiffs, are often charged for receiving text messages from  
25 their service providers.

### 26 **CLASS-ACTION ALLEGATIONS**

27 21. Plaintiffs bring this action as a class action pursuant to Federal Rule of  
28 Procedure 23(b)(2) and 23(b)(3). Plaintiffs seek to represent a class composed of

1 and defined as follows: All persons who received one or more unauthorized text  
2 messages from Defendants.

3 22. The class excludes counsel representing the class, governmental  
4 entities, Defendants, any entity in which Defendants have a controlling interest,  
5 Defendants' officers, directors, affiliates, legal representatives, employees, co-  
6 conspirators, successors, subsidiaries, and assigns, any judicial officer presiding  
7 over this matter, the members of their immediate families and judicial staff, and any  
8 individual whose interests are antagonistic to other putative class members.

9 23. Plaintiffs reserve the right to amend or modify the class description  
10 with greater specificity or further division into subclasses or limitation to particular  
11 issues.

12 24. Numerosity: The proposed classes are so numerous and spread out to  
13 such a degree across the United States that individual joinder of all its members is  
14 impracticable. Upon information and belief the classes comprise many thousands of  
15 members. While the exact number and identities of the putative class members are  
16 unknown at this time, such information can be ascertained through appropriate  
17 investigation and discovery. The disposition of the claims of the class members in a  
18 single class action will provide substantial benefits to all parties and to the Court.

19 25. Typicality: Plaintiffs' claims are typical of the claims of all putative  
20 class members in that Plaintiffs and putative class members suffered similar  
21 damages resulting from a single, continuing course of conduct by Defendants.

22 26. Adequacy of Representation: Plaintiffs will fairly and adequately  
23 represent and protect the interests of the class. Plaintiffs have retained counsel with  
24 substantial experience in prosecuting complex lawsuits and class actions. Plaintiffs  
25 and their counsel are committed to vigorously prosecuting this action on behalf of  
26 the class and have the financial resources to do so. Neither Plaintiffs nor their  
27 counsel have any interests adverse to the class.

28 / / /

27. Superiority of Class Action and Impracticability of Individual Actions:

Plaintiffs and the members of the putative class have suffered, and will continue to suffer, harm as a result of Defendants' unlawful, fraudulent and unfair conduct. A class action is superior to other available methods for the fair and efficient adjudication of the controversy. Individual joinder of all members of the putative class is impractical. Even if individual members of the putative class had the resources to pursue individual litigation, it would be unduly burdensome to the courts to be faced with potentially hundreds of thousands individual cases. Individual litigation magnifies the delay and expense to all parties in the court system of resolving the controversies engendered by Defendants' common course of conduct. The class action device allows a single court to provide the benefits of unitary adjudication, judicial economy, and the fair and equitable handling of all claims of putative class members in a single forum. The conduct of this action as a class action conserves the resources of the parties and of the judicial system, and protects the rights of the putative class members.

28. Common Questions of Law and Fact Predominate: Questions of law and fact common to the claims of Plaintiffs and putative class members predominate over any questions of law or fact affecting only individual members of the putative class. Common questions of law and fact include but are not limited to the following:

- a) Whether the text messages sent by Defendants violated the TCPA;
- b) Whether Plaintiffs and the putative class members were damaged thereby and the extent of damages for such violation;
- c) Whether Defendants and their agents should be enjoined from engaging in such conduct in the future;
- d) Whether Defendants willfully or knowingly violated the TCPA; and
- e) Whether Plaintiffs and putative class members are entitled to treble damages.



29. Plaintiff's claims are typical of the claims of the class. Plaintiff, like all putative class members, sustained injuries and damages arising out of and caused by Defendants' common course of conduct in violation of statutes, as well as regulations that have the force and effect of law, as alleged herein.

**FIRST CAUSE OF ACTION**  
**VIOLATION OF THE TELEPHONE CONSUMER PROTECTION ACT,**  
**47 U.S.C. § 227**

30. Plaintiffs incorporate paragraphs 1 through 29 as though fully set forth herein.

31. The foregoing acts and omissions of Defendants constitute numerous and multiple violations of the TCPA.

32. As a direct and proximate cause of Defendants' unlawful conduct, Plaintiffs and all members of the putative class have suffered damages, as alleged above.

33. Pursuant to 47 U.S.C. § 227(b)(3)(B) Plaintiffs and putative class members are entitled to the greater of their actual monetary loss or \$500 for each and every violation of the TCPA.

34. Moreover, because Defendants willfully or knowingly violated the TCPA as alleged above, Plaintiffs and putative class members are entitled to three times the amount of damages available under 47 U.S.C. § 227(b)(3)(B).

35. Finally, pursuant to 47 U.S.C. § 227(b)(3)(A), Plaintiffs and the putative class are also entitled to injunctive relief.

**RELIEF REQUESTED**

WHEREFORE, Plaintiffs pray for the following relief:

1. For an order certifying this action as a class action.
2. For actual and statutory damages.
3. For an order enjoining Defendants from engaging in the unlawful conduct adumbrated in this Complaint.



4. For an award of pre-judgment and post-judgment interest.
5. For an award providing for the payment of the costs of this suit.
6. For an award of attorneys' fees, to the extent provided by law.
7. For such other and further relief as this Court may deem proper and just.

DATED: August 1, 2013

ORSHANSKY & YEREMIAN LLP

By /s/ Anthony J. Orshansky

Anthony J. Orshansky  
Attorneys for Plaintiffs and the  
Putative Class

**DEMAND FOR JURY TRIAL**

Plaintiffs hereby demands trial of their claims by jury to the extent authorized by law.

DATED: August 1, 2013

ORSHANSKY & YEREMIAN LLP

By /s/ Anthony J. Orshansky

Anthony J. Orshansky  
Attorneys for Plaintiffs and the  
Putative Class